No. 10394

In the United States Circuit Court of Appeals

For the Ninth Circuit

ADOLPH SUNDBERG,

Appellant,

v.

WASHINGTON FISH & OYSTER COMPANY, a corporation,

Appellee.

Appellant's Brief on Appeal

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

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SUBJECT INDEX

	Page
Statement of pleadings and facts showing jurisdiction	1
Statement of the case	3
Specification and assignment of errors and points	9
Argument and authorities:	
(a) The evidence showed appellant to be a seaman within the meaning of the Seamen's Act	11
(b) In the alternative, if appellant was not a seaman then he was a passenger on board appellee's vessel	15
(c) In either of the events specified in (a) and (b), appellee owed appellant reasonable care	16
(d) and (e) Evidence showed actionable negligence of the master which was proximate cause of appellant's injuries	20
(f) In any event, appellant was entitled to maintenance and care	25

INDEX OF CASES

Page

C. P. Co. v. Sandanger, 259 U. S. 255; 66 L. Ed. 927 11

Castle v. Duryea, 2 Keyes (N. Y.) 169 21

Compton v. Hammond Lbr. Co., 153 Or. 546; 58 P. (2d) 235; (certiorari denied 299 U. S. 578, 81 L. Ed. 426) 17

Cortes v. Balt. Insular Line, 287 U. S. 367; 77 L. Ed. 368 17

Cromwell v. Slaney, 65 F. (2d) 940 11

Dietze v. Riverview Park Co., 181 Ill. App. 357 21

Domandich v. Doratich, et al, 5 P. (2d) 310 11

Graffan v. Saco Grange P. H., 112 Me. 508; 92 Atl. 649 21

Int. Stevedor. Co. v. Haverty, 272 U. S. 50; 71 L. Ed. 157 11

Jamison v. Encarnacion, 281 U. S. 635; 74 L. Ed. 1082 21

Larson v. Calder's Park Co., 54 Utah, 325; 180 P. 599 21

McCall v. Inter-Harbor Nav. Co., 154 Or. 252; 59 P. (2d) 697 17

McGee v. Sinclair, Fed. Supp. Adv. Sheets, Feb. 1, 1943, (Vol. 47, No. 10, p. 912) (D. C. Penn.) 17

No. Alaska Salmon Co. v. Larsen, 220 F. 93, 94 12

Olson v. Hemsley, 40 N. D. 779; 187 N. W. 147 21

Plaskett v. Benton Warren Agri. Soc., 45 Ind. App. 358; 89 N. E. 968 21

Sandanger v. Carlisle Pkg. Co., 192 P. 1005 11

Simmons v. Ore. R. R. Co., 41 Or. 151; 69 P. 440, 1022 15

State S. S. Co. v. Berglann, 40 F. (2d) 456; (certiorari denied 282 U. S. 868; 75 L. Ed. 767) 17

Storgard v. France and Canada S. S. Corp., 2 C. I. R., 263 F. 545 19

INDEX OF CASES—Continued

Page

Stratton v. U. S., 8 Fed. Supp. 129 ... 21

Szesz v. Joyland Co., 257 P. 871 ... 21

The Buena Ventura, 243 F. 797 ... 11

The Carrier Dove, 97 F. 111 ... 11

The Estrella, 2 F. Supp. 258 (affirmed 67 F. (2d) 991) ... 21

The Lord Derby, 17 F. 265 ... 17

The Max Morris, 137 U. S. 1; 34 L. Ed. 586 ... 21

The Norland, 101 F. (2d) 967 ... 11

The Sea Lark, 14 F. (2d) 201 ... 11

Thornton v. Maine State Agri. Soc., 97 Me. 108; 53 Atl. 979 ... 21

U. S. C. A. Title 28, Sec. 225 (Amended Act May 9, 1942, Sec. 2, 56 Stat. 272) ... 2

U. S. C. A. Title 46, Sec. 688 (Act of Congress, June 5, 1940, C. 250, Sec. 33, 41 Stat. 1007) ... 1

Warner v. Goltra, 293 U. S. 155; 79 L. Ed. 254 ... 11

Waterbury v. N. Y. Central and H. R. R. Co., 17 F. 674 ... 15

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Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION

This is an action brought under the provisions of the Act of Congress of June 5, 1920, C. 250, Section 33, 41 Stat. 1007 (Section 688 Title 46, U.S.C.A.) On this ground, the court below had jurisdiction.

It is an action, as shown by the pleadings and proof, to seek recovery for a maritime tort resulting in personal injuries received upon a vessel in navigable water, or, in the alternative, to recover maintenance and cure according to the general rules of admiralty, and it is within the general admiralty and maritime jurisdiction of the District Courts of the United States. No question was made in the court below touching the venue chosen or challenging the jurisdiction.

In any event, a diversity of citizenship exists between appellant and appellee, appellant being a citizen of the State of Oregon, and defendant a corportion incorporated under the laws of the State of Washington, and the matter in controversy exceeds $3000.00, being the sum of $21,464.85. The court below had jurisdiction, and the Circuit Court of Appeals has jurisdiction by virture of Section 225 Title 28, U.S.C.A. (amended act May 9, 1942, Sec. 2, 56 Stat. 272).

STATEMENT OF THE CASE

Appellant brought this action in the court below, electing to proceed in conformity with the provisions of Section 688 Title 46, U.S.C.A., and, in the alternative, sought maintenance and cure in conformity with the general principles of admiralty. The case being at issue, the same came on for trial before the District Court and a jury, and at the close of appellant's evidence, upon motion of appellee, the court dismissed the cause by a final judgment, awarding costs against appellant. (Tr. 10.)

It is not believed that the issues require an analysis of the pleadings, inasmuch as no questions arise save the sufficiency of the evidence to entitle the appellant to relief.

The evidence shows that appellant, a man 33 years of age, a fisherman by occupation, was employed by appellee during the fishing season of 1939 under an informal oral arrangement, by the terms of which appellant went from Seattle, Washington, to the cannery of appellee in Alaska, performed certain land service there, and upon completion of that service participated in the operation of a fishing boat of appellee. The arrangement made in the year 1939, being the year prior to that in which the injury was received, was that appellant would make the trip from Seattle, Washington, to Port

Williams, Alaska, on appellant's diesel motorship Commonwealth and would assist in the navigation of the ship by standing a wheel watch in the navigation of the ship, paying nothing for his transportation and receiving no compensation for his services at the wheel. (Tr. 20, 21, 22.) During that year he performed about eight days' work at the cannery of appellee at Anchorage, being paid therefor by appellee $5.00 per day and board. Board was furnished by appellee on the ship. (Tr. 22.) The nature of the employment was commonly understood by both appellant and appellee, and, being desirous of securing the same employment in the year 1940, appellant applied to appellee's agent, Mark Jensen, inquiring if he could again go on the boat and was told that he could. No additional instructions were given, but appellant understood that he would be required to serve a watch each day as part of the general arrangement. (Tr. 23.) Having boarded the boat and being desirous of serving in the engine room rather than at the wheel, appellant asked the engineer whether he could serve an engine watch instead of the wheel watch and was told that he could. (Tr. 23.) With no more formal arrangement as to his duties than this, appellant did, from the time the vessel left until the time of his injury, serve a six hour engine watch each day in assisting in the navigation of the vessel.

In arranging for the trip there was no specific

conversation in which appellant was ordered to stand watch, but it was a matter of common understanding among the men that if they went on the boat they would be expected to perform this service. (Tr. 38.)

The Commonwealth was a diesel motored vessel about 110 feet long (Tr. 23), and about 28 feet across the beam (Tr. 24). She was heavily laden and the deck was crowded with freight, consisting of several skiffs, a large cold storage plant, quantities of box boards, and other freight, leaving very little room on the deck. (Tr. 24.) There was passage way on one side of the vessel and a passage way across the ship. (Tr. 24, 25.)

On the second day out, two members of the crew, Irving Taylor and Lew Varner, each brought on deck a high powered rifle. The vessel was then in Canadian waters, and after one or two shots had been fired by the men with the rifles, Captain Chistensen, the master of the vessel, said to the men with the rifles, "You had better not fire while we are in Canadian waters, or we might get into trouble." (Tr. 25.) These two men were members of the crew, and at the direction of the master desisted from shooting and did not fire any more shots while the vessel was in Canadian waters, which was a period of three or four days. (Tr. 26.)

However, after the vessel left Canadian waters

and within an hour or two after it left Ketchikan, the two men brought their rifles on deck again and began firing from the deck of the vessel. (Tr. 27.) They fired mostly from the rail, sometimes standing four to six feet inside the rail and firing out over the rail. The Captain during the firing was at times in the wheel house and at times on the deck, and the shooting was done in his presence. There were at least several shots fired daily from the vessel, and this shooting continued for about four days. No further orders were given by the Captain to the men to desist from the shooting, and there was no interference by the master with the possession or discharge of the guns. (Tr. 28, 29.)

On the day of the accident appellant, Captain Christensen, and another, were in the wheel house. Some sea lions were sighted and appellant went to the forecastle and called below deck for Irving Taylor to come on deck to see the sea lions. Taylor was a friend of appellant and, it being his first trip, had never seen sea lions. (Tr. 29.) Appellant had never owned a gun in his life and had taken no part in the firing of guns from the vessel, and had no gun of his own. He said nothing to Taylor or to anyone about shooting at the sea lions, but merely called Taylor to come on deck and see them. (Tr. 29.) Taylor thereupon came up the companionway and stood at the rail on some boards, looking at the sea

lions which appellant was pointing out to him. So far as appellant was able to recall, Taylor did not have his gun with him. The sea lions were on the starboard side of the ship a hundred yards or so away, and appellant, standing behind Taylor, was pointing at the sea lions to call them to Taylor's attention. He was pointing with his left hand when, without warning, Lewis Varner, who was several feet behind appellant and Taylor, fired at the sea lions, apparently attempting to shoot past appellant, but accidentally hitting appellant's left wrist. (Tr. 31, 31.)

It is not necessary to detail the injuries further than to say that appellant's left hand was virtually destroyed; that the injury incapacitated him for a long period of time and caused him to incur obligations for hospital and medical care and treatment upon which a balance of $134.85 remained unpaid. Appellee advanced him money to the extent of $65.00 but no more, and substantial sums would have been due him under the general principles of admiralty as maintenance and cure if he was entitled to recover on that ground. It is not deemed necessary to compute those items for the purpose of this appeal, yet they are fairly computable from the record.

Appellant was taken into the Captain's quarters and given first aid, and in the conversation occurring

there the master of the boat said to appellant:

> "So you got it. That is too bad. I knew I should have told those boys about those guns; but you know how it is. I hated to do anything." (Tr. 31, 32.)

Upon this evidence, which stood undisputed at the time of the motion, appellee presented a motion in the form of a motion for directed verdict on the ground, first, that appellant was not in the course of his employment at the time he sustained the injuries complained of, and, second, that there was no showing of negligence upon the part of appellee in the case, and particularly no showing of negligence on the part of the appellee or any of its agents then engaged in the course of their employment. (Tr. 46.)

Treating the motion as one for dismissal under the rules, the court granted the motion and ordered that appellant's complaint and both causes of action therein alleged be dismissed with prejudice and with costs. (Tr. 10.)

Appellant brings this appeal to review the court's action on this motion.

SPECIFICATION AND ASSIGNMENT OF ERRORS AND POINTS ON WHICH APPELLANT INTENDS TO RELY

1. The court erred in holding that the evidence was not sufficient to entitle appellant to have his case submitted to the jury for their verdict, and in allowing the motion to dismiss, and in dismissing the cause.

For the purpose of this appeal, appellant subdivides this assignment of error into the following contentions:

(a) The evidence showed appellant to be a seaman within the meaning of the Seamen's Act. (U.S.C.A. Title 46, Sec. 688.)

(b) In the alternative, if appellant was not a seaman, then he was a passenger on board appellee's vessel.

(c) In either of the events specified in subdivisions (a) and (b) hereof, it was the duty of appellee to keep and maintain the ship in a reasonably safe condition for appellant's occupancy, and to exercise reasonable supervision and control over the members of the ship's crew to the end that appellant be not exposed to unnecessary hazard during his occupancy of the ship.

(d) The evidence offered by appellant established that, with the knowledge and tacit consent of the master of the ship, members of the crew, other than appellant, continued for a considerable period of time to bring loaded high-powered rifles onto the ship's deck, and without supervision or control to fire the same at random from and across the deck of the ship, and as a result thereof appellant was struck by a ball from one of said rifles and sustained serious and permanent personal injury.

(e) Appellant will contend that the failure of the master of the ship to exercise supervision or control over the members of the crew under the circumstances shown by the evidence constituted actionable negligence and entitled appellant to have the evidence submitted by him considered by the jury.

(f) Appellant will contend that in any event while in the service of the ship as a seaman he sustained personal injury requiring cure, and incurred obligations in that behalf, and was entitled to recover maintenance and cure therefor under the general principles of maritime law.

ARGUMENT AND AUTHORITIES

(a) The evidence showed appellant to be a seaman within the meaning of the Seamen's Act. (U.S. C.A. Title 46, Sec. 688.)

Domandich v. Doratich, et al, 5 P. (2d) 310;

Sandanger v. Carlisle Pkg. Co., 192 P. 1005;

C. P. Co. v. Sandanger, 259 U. S. 255, 66 L. Ed. 927;

The Sea Lark, 14 F. (2d) 201;

Warner v. Goltra, 293 U. S. 155, 79 L. Ed. 254;

Int. Stevedor. Co. v. Haverty, 272 U. S. 50; 71 L. Ed. 157;

Cromwell v. Slaney, 65 F. (2d) 940;

The Carrier Dove, 97 F. 111;

The Norland, 101 F. (2d) 967;

The Buena Ventura, 243 F. 797.

Appellant's contract of employment was informal. Mere informality, however, cannot prevent a judicial determination of its legal effect. Appellant joined a crew of men on a trip, the nature of which was well understood. It was a season's employment, including several elements. The men, the vessel and large quantities of material were to be transported from Seattle to Port Williams, a voyage requiring several days. Some shore work was to be done at

Port Williams, and fishing was to be carried on in boats furnished by appellee. Not all of the crew of men required by appellee traveled by the boat. Some went by other means of transportation at their own cost. A comparative few went with the boat, and these were expected to assist in the navigation of the boat. It is true that an advantage resulted to the men who went with the boat. They escaped payment of their transportation costs. But advantage also resulted to appellee. It escaped paying a crew and was at no expense for the men needed to navigate the vessel beyond the cost of their meals. It is not believed that the informality of the contract, nor the fact that no fixed wage was paid for the services rendered in navigating the vessel, prevents the conclusion that appellant was an employe and a seaman.

We cite with particular emphasis the Washington case of Domandich v. Doratich, supra. In that case the Supreme Court of Washington considered a state of facts very close to the facts at bar. The contract there was informal. The compensation was based upon the amount of fish caught. Yet the court held the plaintiff to be an employe and a seaman. The court cited No. Alaska Salmon Co. v. Larsen, 220 F. 93, 94, wherein this court held that the general contract of an employe on a trip virtually identical with that involved here was maritime in

its nature, and that the shore services were merely incidental and subsidiary to the main contract.

Here there was no specific discussion of the terms of the contract. As appellant put it, it was "a known fact that they expect that of you." (Tr. 38.) The answer conceded that appellant was being transported as an employe. (Tr. 8.) It was alleged in the answer that employment was to begin upon arrival at Port Williams. As the evidence stood when the motion was acted upon, however, there was no dispute that the services rendered by appellant were accepted by appellee, and it is not conceived that had the case continued any dispute could have arisen on that subject. Clearly, under the authorities cited a time would have arisen when appellant would have been entitled to expect of appellee performance of the duties owed by a master to a servant. It seems to us logical, and we believe the authorities sustain the view, that those duties began when appellant entered upon appellee's vessel and began the performance of service incidental to his season's contract. We appreciate that the Washington authorities cited come from a state court and may not be deemed to be binding authority upon this court. We submit, however, that they are of high persuasive value, particularly inasmuch as they are based upon a careful analysis of the cases from the federal courts.

It is to be presumed that the framers of the Seamen's Act were familiar with the terminology employed in the admiralty courts. As early as 1899, the federal courts had held fishermen to be seamen. In The Carrier Dove, supra, the following significant language is used:

> "Fishermen are seamen, having uses and customs peculiar to their business, but are, at the same time, except as modified by their peculiar contracts, express or implied, protected by the law as other seamen are."

And in The Buena Ventura, supra, the court said:

> "It is preferred to put the decision on this broad ground; i.e., that a man who serves the ship as the result of a contractual engagement of any kind, and serves in her navigation, is a member of the crew and entitled to the privileges of a seaman."

As was pointed out in Warner v. Golta, supra, it was certainly not the purpose of the Seamen's Act to narrow the concept of the term seaman, or to limit the remedial rights created by the act to a small class. The employment shown by the evidence here is not at all uncommon in Pacific Coast fishing operations. A large number of men go annually to Alaska. Some find transportation at their own cost. Others, as an

incident to a season's contract, assist in navigation of the ship. It is submitted that under the authorities cited, as well as the logic of the Seamen's Act itself, those who assist in navigation of ships on these long and hazardous voyages ought not to be denied the rights created by the Seamen's Act on a hypertechnical view of their relationship to the owners of the ship.

(b) In the alternative, if appellant was not a seaman, then he was a passenger on board appellee's vessel.

> Simmons v. Oregon Railroad Co., 41 Or. 151; 69 P. 440, 1022;
>
> Waterbury v. New York Central and H. R. R. Co., 17 F. 674.

It is conceded by the answer that appellant was lawfully upon the vessel, and it is claimed that he was being transported as an employe from Seattle to Port Williams. We have cited but few authorities to the proposition that an employer who furnishes an employe with transportation owes to the employe during the course of the transportation the duty of exercising reasonable care, to the end that the employe does not suffer injuries preventable by the exercise of that care on the part of the employer. If the relation is not strictly that of passenger and carrier, it is a relationship analagous to it. The duties

are the same. The liability in the event duty is not performed is the same. It is our view that the rules of civil procedure for the District Courts are sufficiently broad that if appellant had misconceived his remedy and claimed under the Seamen's Act when he should have claimed as a passenger, the court was none the less in error in dismissing his cause. Rules 1 and 2 seem to cover the matter. They provide but for one form of action to be known as a civil action. Subdivision (f) of Rule 7 provides for the construction of pleadings so as to do substantial justice. Hence, we submit that even though it be held that appellant was not a seaman, he was entitled to go to the jury upon his evidence. The cause was maritime in any event; there was a diversity of citizenship among the parties; the court had undoubted jurisdiction; the facts relied upon were concisely and directly stated in the complaint. If there was a variance, it was one of form only and not of substance.

(c) In either of the events specified in subdivisions (a) and (b) hereof, it was the duty of appellee to keep and maintain the ship in a reasonably safe condition for appellant's occupancy, and to exercise reasonable supervision and control over the mem-

bers of the ship's crew to the end that appellant be not exposed to unnecessary hazard during his occupancy of the ship.

Cortes v. Balt. Insular Line, 287 U. S. 367; 77 L. Ed. 368;

McCall v. Inter-Harbor Nav. Co., 154 Or. 252; 59 P. (2d) 697;

State S. S. Co. v. Berglann, 40 F. (2d) 456; (certiorari denied 282 U. S. 868; 75 L. Ed. 767);

Compton v. Hammond Lbr. Co., 153 Or. 546; 58 P. (2d) 235; (certiorari denied 299 U. S. 578, 81 L. Ed. 426);

McGee v. Sinclair, Fed. Supp. Adv. Shts., Feb. 1, 1943; (Vol. 47, No. 10, p. 912.) (D.C.Penn.);

The Lord Derby, 17 F. 265.

It is not believed that the circumstance that appellant was not actively performing his duties in the engine room at the time he was injured prevents the application of the Jones Act to his injury. We submit that cases cited, as well as the logic of the act itself, sustain the proposition that a seamen's employer is liable to him for an injury sustained while he is upon the vessel, if that injury be due in whole or in part to negligence of the employer in failing to exercise reasonable care to the end that the vessel

be a safe place for occupancy by the seaman. In the cases cited this rule has been applied to many situations. A seaman is performing no service while sleeping in his bunk at night, and yet liability under the Seamen's Act has been imposed for negligence of the employer in failing to furnish proper sleeping quarters, or in failing to do any other act which a reasonably prudent person would do in the maintenance of the ship. The term "unseaworthiness" has been given a broad application. It has been said that a ship is seaworthy only if she is properly appareled, and supplied with competent officers and crew, and is in general a reasonably safe place for occupancy. It is not conceived, however, that a refinement of definition of unseaworthiness need be indulged in. Whether we speak of unseaworthiness or of negligence in the discharge of the duties imposed upon those in charge of the ship, the result is the same. Liability is imposed for mal-performance or non-performance of the duty to exercise reasonable care not only in the maintenance of the ship but in the control and management of its affairs.

The case of McGee v. Sinclair Refining Co., supra, seems to us in point. Here a seaman was bitten by a small dog not shown to have been of vicious habits. The negligence claimed was the failure of the master to prevent the puppy from being at large on the vessel's deck. The court felt that the fact that dogs

were permitted to wander about the vessel without restraint or supervision entitled the plaintiff to go to the jury. It was held that the jury might properly find from such evidence that the employer failed to perform the duty of exercising reasonable care to the end that the ship be reasonably safe for the seaman, and in the course of the opinion said:

> "I feel that as has been stated in Storgard v. France and Canada S.S. Corp., 2 C.I.R., 263 F. 545, the peculiar circumstances which are attendant upon a seaman's discharge of his duties require that the rules of common law respecting proof of the employer's negligence be not visited too vigorously upon seamen."

We think it not necessary to apply this logic to the case at bar. It was probably necessary to apply it to the case cited. There the negligence was slight. It consisted only in permitting dogs ordinarily harmless to be about the deck of the ship where sailors might run into them in the dark or step upon them and be bitten. While we fully agree with the court that the question whether failure to prevent the dogs being about the ship constituted negligence was one for the jury, we are not impressed with the thought that it was an act fraught with such probable serious consequence as to be more than slight negligence. Here, however, with all deference to the trial court,

who felt that no negligence was shown, it is our view that the negligence was glaring.

That an action will lie for any conduct of the master and owners amounting to a want of care for the safety of those lawfully on board the ship, whatever their relationship to the ship, is taught by the early case of The Lord Derby, supra. There a pilot, lawfully on the ship, was bitten by a large dog carried as cargo which was chained under a table in the quarters where the pilot left his personal belongings. The decision was not based on the doctrine of scienter as it applies to animals in common law cases, but was predicated upon the view that it was negligence to put the dog there.

The cases, of course, vary in their factual situations but they all proceed upon the basis that the ship and those put in charge of it by the owner are liable in damages to one lawfully on the ship for failure to discharge the duty of seeing to it that conditions upon the ship are reasonably safe, and we submit that failure to prevent the continued use of fireams about the deck of a heavily laden ship is an omission of care which ought to sustain an action by one injured as the result of that failure.

(d) and (e) The evidence showed actionable negligence of the master, which was the proximate cause of appellant's injuries. Contributory negli-

gence was a defense only in mitigation of damages, although appellant contends there was no evidence upon which a jury could have found contributory negligence.

Szesz v. Joyland Co., 257 P. 871 (hearing denied by Supreme Court);

Larson v. Calder's Park Co., 54 Utah 325; 180 P. 599;

Plaskett v. Benton Warren Agri. Soc., 45 Ind. App. 358; 89 N. E. 968;

Thornton v. Maine State Agri. Soc., 97 Me. 108; 53 Atl. 979;

Graffan v. Saco Grange P. H., 112 Me. 508; 92 Atl. 649;

Dietze v. Riverview Park Co., 181 Ill. App. 357;

Olson v. Hemsley, 40 N. D. 779; 187 N. W. 147;

Castle v. Duryea, 2 Keyes (N.Y.) 169;

Stratton v. U. S., 8 Fed. Supp. 429;

Jamison v. Encarnacion, 281 U. S. 635; 74 L. Ed. 1082;

The Estrella, 2 Fed. Supp. 258 (affirmed 67 F. (2d) 991);

The Max Morris, 137 U. S. 1; 34 L. Ed. 586.

It has been difficult to find cases respecting negligence in control of the use of firearms on shipboard. There are many state court cases holding in

effect that wherever numbers of persons congregate together it is actionable negligence for those charged with the duty of keeping the place where such persons congregate reasonably safe to permit the possession or use of loaded firearms. The mere statement of this proposition should furnish its own demonstration. The danger of injury by the uncontrolled and unregulated possession or use of firearms is a matter of common knowledge. It is a matter of common knowledge that most, if not all, incorporated cities and towns have ordinances prohibiting the possession of loaded firearms on the streets. It is a matter of common knowledge that carriers have strict rules touching the transportation of firearms. It is likewise a matter of common knowledge that firearms are a highly prolific source of injury and death. Many persons are injured and killed in gun accidents, and the control of the use of guns has been a serious problem to society since their invention. The problem posed to the court and jury was, first, whether it was reasonably safe for two members of the crew to stand upon the deck of the vessel with loaded high-powered rifles shooting, sometimes from the rail and sometimes from several feet inside the rail, at whatever target intrigued the fancy of the men with the guns. Appellant need contend for no more here than that that question was one for the solution of the jury. It seems un-

necessary to cite authorities for the proposition that the right of trial by jury is sufficiently broad to entitle a suitor to have the judgment of his peers upon the safety or danger involved in particular courses of conduct. The restriction upon this right may be stated by asserting that it does not extend to situations where all fair minds must agree that a given situation is or is not attended with danger, or where the right or wrong of the matter is regulated by positive law. Juries are not entitled to hold that it is safe to cross a railroad crossing without looking or listening. Common knowledge denounces the act as negligence, and the courts can declare such common knowledge. Certainly, neither common knowledge nor positive law approve the promiscuous firing of firearms in any position in which persons may be injured. Whatever rule there is of common knowledge denounces the possession and use of firearms in crowded places as a dangerous and hazardous practice rather than as a safe one, and we submit that a ruling that as a matter of law no danger was incident to the use of firearms under the circumstances shown by the evidence, and that there was no reasonable basis for the jury to find that the likelihood of injury was foreseeable, could not logically be sustained.

It would seem that the statement of the master, shown at pages 21 and 32 of the Transcript, itself

constituted some evidence. It tended to show that the master had prior to the injury been conscious that a dangerous situation existed on the ship. There could be no serious question of the right of the master to regulate the use and possession of firearms, and to prohibit that practice on the ship's deck. If there were, however, any such question, it would so far as this record is concerned be set at rest by the evidence touching the earlier restrictions put upon the use of the guns by the master. While the ship was in Canadian waters the master ordered the guns put away. A fair inference from the order shown by the evidence, and the obedience which the crew accorded to it, would be that the master gave tacit consent to the use of the guns as soon as the ship left Canadian waters. The inference was properly deducible that the master took notice of the possession and use of the guns, and by placing a restriction upon their use while in Canadian waters left the owners of the guns to suppose that their use was permissible out of Canadian waters. The authority of the master on shipboard undoubtedly extended to the members of this crew. Certainly the courts would have sustained the master in the exercise of the powers incident to his position as the same are known to the admiralty law. It has not been suggested that an order of the master to desist from the practice of bringing loaded guns on the

deck and firing from there would not have met with obedience. The presumption is that it would have been obeyed. It was the duty of the members of the crew to obey such an order if it were given. The presumption is strengthened by the evidence that the one order restricting the use of the guns which was given was promptly and cheerfully obeyed. The jury might properly have found, and we believe their finding would have been overwhelmingly sustained by the evidence, that had the master made the one order broader and included in it the use of the firearms during the entire voyage, appellant would not have received the grievous injury he did.

(f) In any event, appellant sustained injury while in the service of the ship, required cure, incurred obligations for cure which were not paid, and was entitled to maintenance, cure, and wages to the end of the voyage, under the general principles of maritime law.

The Buena Ventura, 243 F. 797.

It is not thought necessary to cite extensive authority on this proposition. The cases cited under other heads sustain the view that the employment of appellant should have been considered as a season's employment. These cases likewise sustain the view that the fact that a fixed wage per day or hour was not being paid for a particular portion of the

service he was to render did not deprive him of the rights of a seaman, and that inasmuch as he sustained injury he was entitled to the well-known maritime relief of maintenance and cure and wages to the end of the voyage. The voyage contemplated a trip to Alaska, the performance of service there, and return to Seattle. Evidence was offered touching the earnings of others of the crew situated as appellant was, and a sum of money was shown to have been left unpaid as part of the expense of cure. Maintenance was not furnished, and in any event appellant was entitled to relief on this account and the dismissal of his case was error.

Respectfully submitted,

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